

No. 93-1677

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1993

STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JEFFERSON LINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT JEFFERSON LINES, INC. S
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the State of Oklahoma exact an unfair portion of the proceeds of interstate commerce by levying a tax on the gross purchase price of an interstate bus ticket regardless of the pro rata portion of travel which occurs in Oklahoma and even though Oklahoma bears no special relation or confers any proportionate benefit to such travel?

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STATE OF OKLAHOMA, EX REL.
OKLAHOMA TAX COMMISSION, PETITIONER

v.

JEFFERSON LINES, INC., RESPONDENT

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENT JEFFERSON LINES, INC.'S
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent Jefferson Lines, Inc. respectfully prays that
the petition for writ of certiorari be denied.

OPINIONS BELOW

The opinions below are adequately set forth in the
Petition for Writ of Certiorari ("Petition") and are appended to
the Petitioner's Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power . . .

* * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent sections of the Oklahoma Sales Tax statutes are as follows:

OKLA. STAT. tit. 68, § 1354(1)(C) (Supp. 1988):

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following:

(C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;

STATEMENT OF CASE

Respondent Jefferson Lines, Inc. ("Jefferson")¹ was a common carrier providing bus services in Oklahoma as well as numerous other states. In its operation in Oklahoma, Jefferson sold both "intrastate" and "interstate" tickets. "Intrastate tickets" relate to routes which both originate and terminate solely within the State of Oklahoma. Conversely, "interstate tickets" sold in Oklahoma relate to: (1) routes which originate in Oklahoma and terminate in a state other than Oklahoma; (2) routes which originate and terminate in Oklahoma but involve travel outside of the State of Oklahoma (i.e., "roundtrip tickets"); and (3) routes which are purchased in the State of Oklahoma for travel that neither originates nor terminates in Oklahoma but necessarily cross at least one state line.

On October 27, 1989, Jefferson filed its Petition for Voluntary Chapter 11 Bankruptcy with the United States Bankruptcy Court District of Minnesota. On August 3, 1990, Jefferson's Plan of Reorganization was confirmed. In conjunction with Jefferson's Chapter 11 bankruptcy, the Commission filed various proofs of claim which alleged an obligation for the collection and remittance of certain sales tax in Oklahoma. The Commission claimed that Jefferson should have collected and remitted sales tax on the gross price of all bus tickets which merely originated in Oklahoma, even if the ultimate destination was outside Oklahoma or was for travel which would occur outside of Oklahoma. Jefferson objected to the Commission's proofs of claim.

¹ There are no parent companies or subsidiaries which are required to be listed pursuant to Rule 29 of the Rules of the Supreme Court of the United States.

By Order dated May 13, 1992, the United States Bankruptcy Court, District of Minnesota, sustained Jefferson's objection holding that the tax is not fairly apportioned and discriminates against interstate commerce in violation of the mandates of the Commerce Clause of the United States Constitution. The Commission appealed. By Order dated December 22, 1992, the United States District Court, District of Minnesota, affirmed the Bankruptcy Court. The District Court reasoned that the tax establishes a strong potential for multiple taxation and is not reasonably apportioned. The Commission appealed. On January 21, 1994, the Eighth Circuit, in a decision authored by Chief Judge Richard S. Arnold, affirmed the District Court reasoning that Oklahoma was attempting to tax the gross receipts from the sale of transportation outside its borders by taxing more than the in-state component of the interstate activity in violation of the Commerce Clause of the United States Constitution. See *In re Jefferson Lines, Inc.*, 15 F.3d 90 (8th Cir. 1994).

ARGUMENT

- I. Reasons for Denying the Petition for Writ of Certiorari
 - A. The Opinion of the Eighth Circuit is Based Upon Well-Settled Commerce Clause Analyses Developed by This Court Which Repeatedly Deny a State's Authority to Exact an Unfair Portion of Interstate Commerce

The Eighth Circuit correctly applied well-settled analysis to determine the issue of whether a state may levy a tax which is not fairly apportioned in violation of Article I, Section 8 of the Commerce Clause of the United States Constitution. As

correctly held by the Eighth Circuit, the tax in the present case imposes an unconstitutional direct unapportioned tax on interstate commerce.

The Eighth Circuit applied the test articulated by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), to determine whether a state tax violates the Commerce Clause. *Jefferson Lines*, 15 F.3d at 91. As set forth in *Complete Auto*, a state tax which taxes interstate commerce can only be upheld as not violating the Commerce Clause if:

the tax is [1] applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.

Complete Auto, 430 U.S. 274 (1977). Also see, *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1978); *Goldberg v. Sweet*, 488 U.S. 252 (1989); see generally, *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

In order to survive a Commerce Clause challenge, a state statute which places a tax on interstate commerce must satisfy each prong of the four-prong test announced in *Complete Auto*. *Goldberg*, 488 U.S. at 260-268. The Eighth Circuit, as did the District Court, focused solely on the apportionment prong of the *Complete Auto* test where this tax so patently violates the Commerce Clause. As this Court has stated, the purpose of the apportionment prong is to prohibit taxes that pass an unfair share of the tax burden on to interstate commerce. *Quill v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 119 L.Ed. 2d 91 (1992).

B. The Eighth Circuit Correctly Reasoned that Oklahoma's Levying of a Sales Tax on the Total Price of Tickets for Interstate Transportation is an Attempt to Tax the Gross Receipts of the Sale of Transportation Outside its Borders and thus Would Allow Oklahoma to Receive Tax Revenues Attributable to More Than the In-state Component of the Interstate Activity Being Taxed

The Commission contends that the Eighth Circuit opinion is in conflict with the applicable decisions of this Court and the Oklahoma Supreme Court. The Commission's contentions are based upon inconsistent reasoning which attempts to mischaracterize the taxable activity and ignores the practical and economic effect of the tax on interstate commerce. The Commission seeks Petition for Writ of Certiorari solely for this Court to review the conclusion by the Eighth Circuit that the tax, because it is not externally consistent, fails the apportionment prong of the *Complete Auto* test.

The Eighth Circuit correctly applied the reasoning from *Goldberg v. Sweet* in concluding that the tax is not externally consistent.

This Court in *Goldberg* reasoned that:

The external consistency test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

Goldberg, 488 U.S. at 262.

This, of course, is the fundamental problem with the tax and the Commission's application with regard to the collection and remittance of sales tax on interstate tickets. As stated by the Eighth Circuit, "a ticket price is set at least partially on the number of miles travelled." *Jefferson Lines*, 15 F.3d at 92. The Commission seeks to impose a gross receipts tax that cannot reasonably reflect the in-state component of the activity being taxed. Rather, because the tax at issue is levied on the entire gross receipt of the ticket, Oklahoma would receive tax revenue which logically and directly results from out-of-state activities (transportation occurring outside of Oklahoma's borders).

For example, an interstate ticket purchased in a town close to the Oklahoma border for a trip which proceeds immediately across the Oklahoma state line is taxed at the very same rate as an interstate ticket which is purchased in a town in the middle of Oklahoma or a "intrastate" ticket which solely uses Oklahoma roads. The amount of sales tax levied on an interstate ticket has absolutely no relationship with the "in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. "The vice of such a tax is that it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.'" *Central Greyhound*, 334 U.S. at 663. Since Oklahoma taxes the entire gross price of the ticket regardless of the pro rata portion of the trip which occurs in the state, Oklahoma is attempting to directly burden every dollar of interstate commerce.

This Court has already addressed the constitutionality of a tax on interstate transportation. See *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). This Court concluded that such a tax imposed an impermissible burden on

interstate commerce. *Id.* Even though *Central Greyhound* was decided prior to the present four-part analysis of *Complete Auto*, the principles and reasoning of *Central Greyhound* remain unchanged. As noted by the Eighth Circuit, the distinction between *Central Greyhound* and this case is not significant enough to bear the weight the Commission seeks to place upon it. *Jefferson Lines*, 15 F.3d at 93. Thus, because the Eighth Circuit's decision is not in conflict with applicable Supreme Court decisions, the Commission's petition does not raise special and important reasons for this Court to grant writ of certiorari.

Five courts have dealt with the identical issue of whether this tax is externally consistent. All five concluded that this is an unapportioned tax which violates the Commerce Clause of the United States Constitution.¹

¹ See, *In re Jefferson Lines, Inc.*, BKV No. 3-89-4137, United States Bankruptcy Court, District of Minnesota (1992), Petitioner's Appendix C; *In re Jefferson Lines, Inc.*, Civil. No. 3-92-467, United States District Court, District of Minnesota (1992), Petitioner's Appendix B; *Oklahoma v. Jefferson Lines, Inc.* (*In re Jefferson Lines*), 15 F.3d 90 (8th Cir. 1994), Petitioner's Appendix A; *In re Eagle Bus Manufacturing, Inc.*, et al., Case No. 90-00985-B-11 to 90-00990-B-11, United States Bankruptcy Court, Southern District of Texas (1993), Respondent's Appendix A; *In re Eagle Bus Manufacturing, Inc.* et al., Civil Action No. B-93-58, United States District Court, Southern District of Texas (1993), Respondent's Appendix B.

C. The Eighth Circuit Opinion is not in Conflict with Applicable Decisions of this Court

Apparently, because of its differing result, the Commission asserts that the Eighth Circuit opinion conflicts with this Court's reasoning in *Goldberg*. However, the *Goldberg* holding was based upon a factually distinguishable tax. Thus, as will be demonstrated below, the Eighth Circuit opinion is completely consistent with this Court's reasoning in *Goldberg* and other relevant decisions of this Court.

In *Goldberg*, Illinois levied a telecommunications tax on the privilege of originating or receiving interstate telecommunications. *Goldberg*, 488 U.S. at 255-256. Unlike the Illinois tax in *Goldberg*, the Oklahoma taxing scheme has a high risk of multiple taxation. The high risk of multiple taxation results because other states could impose a tax upon the interstate activity and Oklahoma has not provided a credit provision to avoid such risk. *Id.* at 263. A high risk of multiple taxation is a factor for a court to consider in determining whether a state tax is externally consistent. *Goldberg*, 488 U.S. at 261-262.

In the present case, there is a substantial risk of multiple taxation on interstate bus tickets that is not present for intrastate bus tickets. If this Court were to adopt the Commission's Commerce Clause reasoning, there would be no prohibition against a state other than Oklahoma taxing: (1) the entire gross receipt of the same interstate ticket; or (2) that portion of the same interstate ticket whose miles are travelled within that state's borders, regardless of where the ticket originated. Thus, the Commission's assertion that there is absolutely no chance of multiple taxation or a discriminatory burden on interstate commerce is clearly false.

To see the probability of multiple taxation, one must only look at the effect of this present tax under the scenario of a state other than Oklahoma taxing the portion of the route which physically takes place in that state. Under this likely scenario, Jefferson would pay sales tax in Oklahoma on the entire gross receipts of the interstate ticket. In addition, Jefferson would pay sales tax in each of the other states through which its route travels on at least the number of miles traveled in that state. The result is multiple taxation for Jefferson as an interstate common carrier.

Multiple taxation is not a remote possibility. In these economic times, it is very likely that states other than Oklahoma in which Jefferson travelled would be in search of revenue producing taxes. Thus, it is not unlikely that another state may tax an interstate ticket purchased in Oklahoma, at the very least, on the portion of mileage travelled within that state. Even if no other state sought to tax its proportionate share of the revenue from this sale of an interstate ticket, such abstention would not justify the taxing by Oklahoma of the entire gross receipt of the ticket. *Central Greyhound*, 334 U.S. at 663. "By its very nature an unapportioned gross receipts tax makes interstate transportation bear more than a 'fair share' of the cost of the local government whose protection it enjoys." *Id.*

The burden placed on interstate commerce by multiple taxation is readily apparent. The tax and the Commission's application may easily result in multiple taxation and, accordingly, does not meet the external consistency test. *Goldberg* at 261-262.

Moreover, the tax in *Goldberg*, due to administrative and technological barriers, was incapable of being apportioned. *Id.*

at 264-265. However, the tax in this case could be apportioned by the miles traveled within a particular state. *Jefferson Lines*, 15 F.3d at 93. This Court in numerous cases has approved apportionment formulas for taxes based upon miles traveled in a state especially when the tax dealt with the movement of large physical objects over identifiable routes. See, e.g., *American Trucking Associations, Inc. v. Scheiner*, *supra* (trucks); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (cargo containers); *Complete Auto*, *supra* (motor carriers); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (oil pipelines); and *Central Greyhound Lines, Inc. v. Mealey*, *supra* (buses); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (tax on gross receipts of interstate train travel is valid while a like tax on interstate train travel is not).

The Commission contends that the tax is externally consistent and does not need to be apportioned because the tax is on a sale of the ticket and therefore is imposed on local activity. The Commission argues that the taxable activity is the sale of a ticket, not of transportation. The Commission defends its contention by reasoning that only the sale of the ticket is taxed and not the use of the ticket. The Eighth Circuit correctly concluded that this argument is "too technical and flies in the face of how bus ticket prices are set." *Jefferson Lines*, 15 F.3d at 92. The Eighth Circuit recognized that the Commerce Clause analysis must look beyond formalism and consider the practical and economic effect of the tax on interstate commerce. *Id.*; *Goldberg*, 488 U.S. at 264; see also *Central Greyhound*, 334 U.S. at 659-60. In response to the Commission's contention, the Eighth Circuit reasoned:

To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that

the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold otherwise would elevate form over substance and require this Court to ignore economic realities.

Jefferson Lines, 15 F.3d at 92.

Likewise, the Commission's argument that the tax on interstate bus tickets is analogous to a tax on the sale of goods is illogical. The Commission would like this Court to believe that the purchase of an interstate bus ticket is a discreet event in which only the State of Oklahoma has an interest. However, the Commission's reasoning ignores the fundamental notion that the purchase of a good ends that good's participation in the stream of interstate commerce. On the other hand, the purchase of an interstate bus ticket, for all practical purposes, initiates that service's participation in the stream of interstate commerce. The purchase of an interstate bus ticket is not akin to the purchase of a good which is merely utilized or has travelled in interstate commerce. Oklahoma seeks to tax specific activities (travel) which physically occur outside the state. Thus, the Commission's reliance on *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), and *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095, 122 L.Ed. 2d 421 (1993), which uphold a state sales tax on a good, is misplaced. Moreover, this Court did not analyze the taxes in *Wardair* or *Itel* under the *Complete Auto* test. *Wardair*, 477 U.S. at 8; *Itel*, 507 U.S. at ___, 113 S.Ct. 1095, 122 L.Ed. 2d at 436.

The Commission further relies on *McGoldrick v. Berwind-White Coal Mining Company*, 309 U.S. 33 (1939), to demonstrate that the transaction at issue here is not conducted in interstate commerce and that the Eighth Circuit's decision in this case is inconsistent with the holding in *McGoldrick*. The reliance on an alleged conflict with this Court's decision in *McGoldrick* is unwarranted. In a strained effort to analogize *McGoldrick*, the Commission attempts to characterize the sale of an interstate bus ticket as a purely local event not effecting interstate commerce. Such a position is unrealistic.

The term "interstate commerce" means "commerce between any place in a State and any place in another State, or between places in the same State through another State...." *Central Greyhound*, 334 U.S. at 661. It is undisputable that the tax upon which the Commission's claims are premised, is a direct tax on interstate commerce. In the present case, nothing is gained by not recognizing the fact that it is interstate commerce which the State of Oklahoma is seeking to reach. *Id.* However, the Commission seeks to "indulge in pure fiction" by taxing the gross proceeds of an interstate ticket and then ignoring the benefits conferred by the other states through which Jefferson must travel. *Central Greyhound*, 334 U.S. at 660.

In *McGoldrick*, New York City levied a tax on the sale of goods within the city. This Court in *McGoldrick* determined that the taxable event at issue was "the transfer of possession to the purchaser within the state" regardless of the time and place of passing title. *Id.* at 49. The *McGoldrick* case only stands for the position that a state may tax a good which has travelled in interstate commerce but is sold locally. *Id.* See also *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8, 11 (Okla. 1976). The "good", in this case, is interstate

travel. The ticket is merely a receipt. The purchase of interstate travel is not a purely local event and thus, Oklahoma may only tax that portion of revenue which reasonably reflects the in-state portion of the activity being taxed. *Goldberg*, 488 U.S. at 262. Thus, because the Commission is directly taxing interstate commerce and not a good which has merely travelled in interstate commerce (coal), the reasoning from *McGoldrick* is not applicable.

As an apparent last resort, the Commission contends that merely because the Oklahoma sales tax is a "garden variety" sales tax, this Court need not scrutinize the tax utilizing the four-prong *Complete Auto* test. The Commission's assertion attempts to pervert the very protection from over-reaching state taxes that the Commerce Clause promotes. It is insufficient to assert in response to a lack of apportionment finding by five courts that the tax in question is in the nature of a sales tax. The very reason the tax is being challenged is because it applies to an interstate activity. Thus, regardless of the nature of the tax, a state is prohibited by the Commerce Clause from imposing a disproportionate and discriminatory burden on interstate commerce. *Id.* at 270; *see also Quill*, ___ U.S. ___, 112 S.Ct. 1904, 119 L.Ed. 2d 91 (1992). The Eighth Circuit's opinion is completely consistent with the decisions of this Court and the Oklahoma Supreme Court regarding whether a state tax violates the Commerce Clause of the United States Constitution.

CONCLUSION

None of the considerations governing review of certiorari enumerated in paragraph 1(a) of Rule 10 are present in this case. The Petition is wholly without merit and should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:)	
)	
EAGLE BUS MANU-	)	Case No. 90-00985-B-11
FACTURING, INC.,	)	TO 90-00990-B-11
GREYHOUND LINES,)	
INC., TRAILWAY	)	JOINTLY
COMMUTER TRANSIT,	)	ADMINISTERED
INC., BUSLEASE,	)	Case No. 90-00985-B-11
INC., GLI BUS	)	and
OPERATIONS	)	Case Nos. 90-01984-B-
HOLDING COMPANY,	)	11
GLI FOOD SERVICES,	)	TO 90-01989-B-11
INC., SOUTHERN	)	(Chapter 11)
GREYHOUND LINES,)	
CO., GLI HOLDING	)	JOINTLY
COMPANY, CENTRAL	)	ADMINISTERED
GREYHOUND LINES	)	Case Nos. 90-00985-B11
CO., EASTERN	)	(Chapter 11)
GREYHOUND LINES)	
CO., and WESTERN)	
GREYHOUND LINES CO.	)	[Entered Feb 5, 1993]
Debtors.)	

FINDINGS OF FACT AND CONCLUSIONS OF
LAW REGARDING THE TAX CLAIM OF
THE OKLAHOMA TAX COMMISSION

This matter came before the Court on the Objection of Greyhound Lines, Inc. ("Greyhound") to Claim No. 17,841 filed by the Oklahoma Tax Commission (the "Commission") for recovery of unpaid sales tax in the amount of \$906,866.59 (the "Commission's Claim"). John B. Turner and Rebecca M. Fowler represent Greyhound. Douglas F. Price represents the Commission. The Court, having heard oral arguments on September 28, 1992, and having considered the briefs of the parties, and being fully advised in the matter, now makes the following findings of fact and conclusions of law in support of the Order Disallowing the Tax Claim of the Oklahoma Tax Commission:

I.

This Court finds that it has jurisdiction pursuant to 28 U.S.C. § 157(a) and 1334(b), and the Order entered on November 11, 1991, confirming the Third Amended Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for Greyhound Lines, Inc. and Its Affiliated Debtors and that this is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

II.

This matter was submitted to the Court on stipulated facts. Greyhound, a Delaware corporation, is a common carrier providing transportation by bus in Oklahoma and many other states. The transportation provided by Greyhound is interstate commerce. Greyhound provides transportation on interstate and intrastate routes. An interstate route is a route which originates in one state and crosses over into another state. An intrastate route is a route solely within a single state.

Greyhound sells tickets in Oklahoma for transportation on the following types of routes:

- a. an intrastate route wholly within the State of Oklahoma;
- b. an intrastate route wholly within a state other than Oklahoma;
- c. an interstate route which commences in Oklahoma and terminates in another state;
- d. an interstate route which commences and terminates in Oklahoma, but passes through another state; and
- e. an interstate route wholly outside the State of Oklahoma.

The Commission, under authority of Oklahoma law, applies a sales tax at a single specified rate to all tickets for transportation sold in Oklahoma. Greyhound, operating under Oklahoma Sales Tax Permit No. 458229, remits, to the state, sales tax on all tickets sold for transportation on an intrastate route wholly within the State of Oklahoma.

Greyhound filed a voluntary petition seeking relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. The Commission subsequently filed claims in Greyhound's case seeking payment of tax on all tickets sold by Greyhound in Oklahoma during the period June 1, 1987 to May 31, 1990, except those sales for which Greyhound had previously remitted tax, and those sales to governmental entities and

churches which the Commission had determined to be exempt from tax. The total amount in controversy is \$906,866.59.

Greyhound objects to the allowance of the claims on the basis that application of Oklahoma's sales tax to the gross receipts from tickets sold in Oklahoma for transportation on routes other than intrastate routes within Oklahoma violates the Commerce Clause of the Constitution.

III.

The issue before the Court is whether the Oklahoma sales tax statute, which levies a tax on the gross receipts from sales of tickets for transportation by bus, violates the Commerce Clause of the United States Constitution.

IV.

Oklahoma collects sales tax from Greyhound pursuant to the Oklahoma Sales Tax Code. 68 O.S. § 1354(1)(C)¹. Greyhound argues that imposition of the tax on gross receipts from sales of tickets for any transportation other than on an intrastate route wholly within the State of Oklahoma violates the Commerce Clause of the Constitution.

The United States Constitution expressly authorizes Congress to "regulate commerce with foreign Nations, and

1. The statute reads in pertinent part: Transportation for hire to persons by common carriers, including railroads, both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire.

among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause has consistently been interpreted to prohibit actions by the states which interfere with interstate commerce. See, e.g., South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177, 185 (1938). The clause, however, may not be used to "relieve those engaged in interstate commerce from their just share of state tax." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

In order to survive constitutional scrutiny, a state tax on interstate commerce, such as the transportation provided by Greyhound, must reflect an appropriate balance between freedom from interference and responsibility for paying a fair share. The Supreme Court identified that balance in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Deciding that it was the practical effect of a state tax which determines its constitutionality, the Complete Auto Court articulated a four-prong test with which to evaluate the effect of a tax. A state tax will be found to be constitutional only if: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the services provided by the taxing state. Id. at 279.

In order to withstand constitutional scrutiny, a state must satisfy each prong of the test. The Oklahoma tax at issue here cannot withstand this test.

A. Nexus

The first prong of the Complete Auto test determines whether the activity subject to the tax has a substantial nexus

with the taxing state. To satisfy this prong of the test there must be a relationship between the activity taxed and the state, and that relationship must be substantial. Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992).

The activity at issue here is transportation on all routes except those wholly within the state of Oklahoma. The Commission, relying on National Geographic Society v. California Bd. of Equalization, argues that the mere sale of the ticket within the state satisfies the requirement that there be a substantial nexus between transportation and the state. 430 U.S. 551 (1977). The National Geographic Court, however, addressed the situation where a California resident received goods in California from an organization which maintained offices in California. The facts in this case, however, differ from those in National Geographic.

Here, Greyhound acknowledges that it maintains offices within the State of Oklahoma. There is, however, no evidence that the transportation at issue is purchased by a resident of Oklahoma. More importantly, the evidence clearly demonstrates that in all instances a portion of the transportation purchased is not received within Oklahoma. Furthermore, in some instances, none of the services received within the state. The conclusion reached in National Geographic, therefore, does not apply here.

The Commission has failed to demonstrate here that there is more than a de minimis connection between the activity at issue and the state. The tax thus fails to satisfy the first prong of the Complete Auto text.

B. Apportionment

The second prong of the Complete Auto test requires that a state tax on an interstate activity be fairly apportioned. 430 U.S. at 279. This requirement ensures that each state taxes only its fair share of an interstate transaction. Goldberg v. Sweet, 488 U.S. 252, 263 (1989). Because there is no single apportionment formula, the taxing statute must be analyzed to determine if it is internally and externally consistent. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 161 (1938).

1. Internal Consistency.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute." Goldberg, 488 U.S. at 263.

The statute at issue here imposes a tax on the gross receipts of each sale of "transportation for hire to persons by common carrier, including . . . motor transportation companies." 68 O.S. § 1354(1)(C). Because the statute fails to identify the point of sale, it allows Oklahoma to tax transportation sold in Oklahoma which occurs partially or completely within another state. The statute also allows Oklahoma to tax transportation sold in other states which occurs within Oklahoma. The text of the statute thus allows Oklahoma to tax the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The transportation at issue here occurs, at least partially, in a state other than Oklahoma. If those states in which transportation occurs had a statute identical to Oklahoma's,

those states would be able to tax the transportation which occurred within their boundaries. For example, if one of the tickets sold in Oklahoma was for travel between Dallas and Houston, Oklahoma would tax the transaction because the ticket sold in Oklahoma, and Texas, if it had an identical statute, could tax the transaction because the transportation occurred in Texas.

The Supreme Court has noted with emphasis that only a tax scheme which allows credits for taxes collected by other states on the same transactions can survive the test of constitutionality. Goldberg, 488 U.S. 256. Oklahoma has no such provision for tax credits. Because the practical possibility of multiple taxation exists here, Oklahoma's taxing statute, therefore, is not internally consistent.

2. External Consistency.

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. at 262. A state tax may thus be applied only to those activities which occur within its borders. Complete Auto, 430 U.S. at 282.

The Oklahoma tax on this interstate activity does not reflect only the in-state component of those activities. Here, Oklahoma attempts to tax a specific interstate activity which physically occurs outside the state. The tax, therefore, is not externally consistent.

The Commission argues that by taxing transportation occurring outside Oklahoma for which tickets are sold in Oklahoma and not taxing transportation which occurs in

Oklahoma for which tickets are sold elsewhere, the state recovers an amount equivalent to what it would recover if it taxes all transportation within the state. The Commission thus argues that the tax is self apportioning.

The Commission cited no authority for this novel theory, and there appears to be none. Moreover, even if there were support in the existing law, the Commission is unable to demonstrate that the proceeds of the tax do, in fact, reflect the transportation provided by Greyhound within the state of Oklahoma. The Commission offers no factual basis for its assumptions and such unfounded assumptions are not sufficient to satisfy the Complete Auto external consistency test.

The Oklahoma statute imposes a tax on activities which physically occur outside its borders. The statute, therefore, clearly fails to satisfy the external consistency prong of the Complete Auto test.

C. Discrimination Against Interstate Commerce

The third prong of the Complete Auto test requires the taxing authority to demonstrate that the tax does not discriminate against interstate commerce. Such discrimination can be reflected on the face of the statute, the intent of the statute, or the practical effect of the statute. Amerada Hess Corp. v. Director, Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). Here, discrimination against interstate commerce is reflected in the practical effect of the statute.

The tax at issue here is applied to the gross receipts from the sale of a ticket including tickets reflecting travel on an interstate route passing through Oklahoma. An interstate

traveler on one of these routes traveling the same number of miles within the state on an intrastate route will thus pay a greater amount of tax. The tax, therefore, imposes a disproportionate burden on interstate travel. See American Trucking Association, Inc. v. Scheiner, 483 U.S. 266 (1987). Because the tax is discriminatory, it fails to pass the third prong of the Complete Auto test.

D. Relation to State Services

The fourth prong of the Complete Auto test analyzes whether the tax imposed is fairly related to the presence and activities of the taxpayer within the state. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

Here, the taxpayers are the bus passengers. There is no dispute that the in-state activities of those passengers benefit from the services provided by the State of Oklahoma, which are funded at least in part by the tax at issue. The passengers whose transportation is at issue here, however, are taxed on out-of-state activities as well as in-state activities, and some passengers are taxed on their out of state activities when they have no in-state activity at all.

The out-of-state activities of Greyhound's passengers, which are taxed at the same rate as in-state activities, receive no benefits from the state of Oklahoma. Those out-of-state activities are benefited instead by the services provided by the other states in which those activities are conducted. There is thus no relation between the tax on transportation which occurs outside the state and services provided by the state within

Oklahoma. The tax at issue here, therefore, fails the fourth prongs of the Complete Auto test.

V.

The tax at issue here is unable to satisfy all four prongs of the Complete Auto test. Greyhound, therefore, is entitled to an order sustaining its objection to the Commission's Claim. The Commission's Claim is disallowed because it reflects a tax on the gross receipts from Greyhound's sales of transportation over routes outside the state and is thus levied in violation of the Commerce Clause of the United States Constitution. A separate order based on the foregoing findings of fact and conclusions of law shall be entered.

Date: FEB 3 1993

/s/ Richard S. Schmidt
Richard S. Schmidt
United States Bankruptcy Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:	§	
	§	
EAGLE BUS MANUFACTURING,	§	
INC., ET AL,	§	Civil Action
Debtor,	§	No. B-93-58
	§	
STATE OF OKLAHOMA, ex rel.	§	
OKLAHOMA TAX COMMISSION	§	
Appellant,	§	[Filed
	§	Oct. 4, 1993]
VS.	§	
	§	
GREYHOUND LINES, INC.,	§	
Appellee.	§	

OPINION

The aforementioned cause number represents an appeal from an order entered by the Bankruptcy Court for the Southern District of Texas, Brownsville Division denying claim number 17841 in Greyhound Lines, Inc. voluntary Chapter 11 petition jointly administered as Bankruptcy No. 90-00985-B-11.

STATEMENT OF THE CASE

Greyhound is a common bus carrier providing transportation in Oklahoma as well as other states. Greyhound

sells transportation in Oklahoma for the following types of routes:

- a. intrastate routes wholly within the State of Oklahoma.
- b. intrastate routes wholly within states other than Oklahoma.
- c. interstate routes originating in Oklahoma but terminating in another state.
- d. interstate routes originating in Oklahoma and terminating in Oklahoma, but passing through another state.
- e. interstate routes wholly outside the state of Oklahoma.

Greyhound Lines, Inc. filed for voluntary relief under Chapter 11 of the Bankruptcy Code on June 4, 1990. In response to this the Appellant, Oklahoma Tax Commission, conducted an audit of Greyhound's books and records, which was completed in November of 1990. The Commission applies a sales tax at a single rate to all tickets for transportation sold in Oklahoma. The audit revealed that Greyhound did not collect state sales taxes from consumers who purchased tickets which involved travel outside the state of Oklahoma.¹

¹ The statute at issue here provides in relevant part:

There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax code, section 1350 et seq. of this title, an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds of each sale of the following.....(emphasis added).

Operating under tax permit no. 458229 Greyhound, however, did remit sales tax on all tickets sold for transportation on an intrastate route wholly within the state of Oklahoma.²

Accordingly, the Commission filed claim no. 17841 for \$908,212.89 representing the amount allegedly owed by Greyhound for transportation sold that did not involve entirely intrastate routes.³ Greyhound filed an objection to this claim on April 10, 1992 asserting that the alleged tax liability claimed by the Commission was an improper tax on interstate commerce and therefore violative of the Commerce Clause of the United States Constitution. Following oral argument on the issue, the parties filed stipulations of fact and briefs for consideration by the Bankruptcy Court. United States Bankruptcy Judge Richard S. Schmidt applied the four-prong

(c) The transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, airlines, and other means of transportation for hire;

Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

² There was no dispute and therefore no claim filed concerning these taxes.

³ This amount reflects the four and one-half percent tax on gross receipts of all tickets sold by Greyhound in Oklahoma from June 1, 1987 to May 31, 1993, except those taxes previously remitted, and those sales to governmental entities and churches which are deemed exempt by the commission, plus penalties and interest.

test enumerated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, (1977) and concluded that Oklahoma's sales tax, as applied, failed all four prongs, and accordingly sustained Greyhound's objection. It is from this determination that the Appellant appeals.

Therefore the issue on appeal is does Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990), which levies a tax on the gross receipts from sales of transportation for hire, including interstate routes, violate the Commerce Clause of the United States Constitution, and as a consequence did the Bankruptcy court properly sustain Greyhound's objection to claim no. 17841.

CONCLUSIONS OF LAW

This appeal is properly before the Court pursuant to 28 U.S.C. § 158 and Bankruptcy Rule 8002. The issues in this case were presented to the Bankruptcy Court by stipulation and involved only questions of law. Therefore the standard of review in this case is De Novo. Matter of Multiponics, Inc., 662 F.2d 709 (5th Cir. 1980).

In what is commonly referred to as the Commerce Clause, the United States Constitution provides: "Congress shall have the power to regulate commerce, with foreign nations, and among the several states, and with the indian tribes." U.S. Const. Art. 1 § 8, cl 2. This grant of power has negative implications on a state's power to tax, and thereby regulates certain transactions involving interstate commerce. In fact, the Commerce Clause has been interpreted to prohibit actions by the states that interfere with interstate commerce. See, Quill Corp. v. North Dakota, 119 L. Ed 91 (1992); South Carolina State Highway Dept. v. Barnwell, 303 U.S. 177, 185 (1983).

Notwithstanding, the Commerce Clause may not be used to exempt persons engaged in interstate commerce from their fair share of state tax. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

State taxes relating to interstate commerce must reflect a balance between paying a just share of taxes and freedom from interference. In Complete Auto Transit, Inc. the Supreme Court pronounced this balance and set forth a four prong test for determining whether or not a state tax violates the Commerce Clause. A state tax will survive constitutional analysis if:

- (1) the tax is applied to an activity with a substantial nexus to the taxing state;
- (2) the tax is fairly apportioned;
- (3) the tax does not discriminate against interstate commerce; and
- (4) the tax is fairly related to the services provided by the taxing state.

Further, in order to pass muster the tax must survive all four of the prongs. Id.

Nexus to the Taxing State

The first prong inquires whether the activity subject to the tax has a substantial nexus or relationship to the taxing state. Id.; Quill Corp. v. North Dakota, 119 L.Ed. 2d 91, 107 (1992)(Holding the relationship between the taxing state and the activity must be substantial). Specifically, the activity to be taxed in this case is transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma.

Appellant cites National Geographic Society v. California Bd. of Equalization, for the proposition that the mere sale of the ticket within the state satisfies the requirement of a nexus between the transportation and the state. 430 U.S. 551 (1977). This Court does not agree. National Geographic involved goods purchased by residents of the state of California and received wholly in California, from an organization that maintained offices in California. The court in National Geographic determined that the goods were subject to the sales tax. The case at hand differs significantly.

Greyhound does maintain offices in Oklahoma, however this is where the similarity to National Geographic ends. There is nothing to show that the transportation at issue here is always purchased by a resident of Oklahoma or that it is always received in Oklahoma. The evidence does, however, demonstrate that the tax on gross receipts taxes a portion of transportation paid for in Oklahoma, but not received in Oklahoma. For example, a ticket purchased in Oklahoma for transportation from Tulsa to Dallas, Texas would be subject to the entire tax, even that portion occurring in Texas. There would be no nexus to Oklahoma for the transportation received in Texas. In fact, as applied, the Oklahoma tax could conceivably tax transportation that does not occur in Oklahoma at all. A ticket purchased in Oklahoma for transportation between Austin, Texas and Dallas, Texas would be subject to the sales tax, yet there is no significant nexus between the transportation and the taxing state. The transportation does not even occur in the state.

In order to follow the Appellant's rational the Court is asked to envision that the good purchased is the ticket, rather than the transportation. The Court is unable to close its eyes to the fact that the good purchased is the transportation, as the

ticket is merely a receipt. The Court does not agree that the purchase of a ticket completes the transaction.

Additionally, the Supreme Court has mandated that the mere origination or termination of interstate activity in a particular state is insufficient to establish a substantial nexus to the taxing state. Goldberg v. Sweet, 488 U.S. 252, 263 (1989)(Concerning the termination of interstate communications). As applied, the activity in this case, transportation on all routes except those wholly within the state of Oklahoma, has nothing more than a minimal connection to the taxing state. Therefore the tax fails the first prong of Complete Auto. This analysis alone would be sufficient for the Bankruptcy Court to find that the tax, as applied to Greyhound, was violative of the Commerce Clause. Nevertheless, the Court will consider the remaining factors.

Apportionment

The second prong of the Complete Auto test requires the Court to consider whether the tax is fairly apportioned. In other words, to consider whether the state is taxing only its fair share of an interstate activity, as opposed to taxing the entire interstate activity. Goldberg, 488 U.S. at 260-261.

While the Supreme Court does not mandate a specific apportionment formula, customarily they have determined transportation tax on interstate commerce to be fairly apportioned when it is based on a physical relationship ratio. Interstate activity such as surface transportation over an interstate route is deemed to be fairly apportioned when it is applied only to the activity that is occurring within its borders. See Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1947); Western Live Stock v. Bureau of Revenue, 303

U.S. 250, 257 (1938); Pan American Airways Inc. v. Government of Virgin Islands, 315 F. Supp. 746, affirmed, 459 F.2d 387 (3rd Cir. 1972) (Recognizing that tax on unapportioned gross sales receipts on transportation can burden interstate commerce, but carving an exception for air travel in that it does not have physical contact with the other state as it passes through its airspace).

The Supreme Court in Central Greyhound was faced with an almost identical issue. The New York Tax Commission was attempting to tax gross sales receipts from Greyhound's transportation sales in New York, which included transportation that occurred in the neighboring states. The Court determined that the entire tax need not fail, but that it must be fairly apportioned to coincide with that portion of the mileage that occurred within the state. Notwithstanding, a specific apportionment method has never been mandated by the Supreme Court, and therefore courts must analyze the tax to determine if it is internally and externally consistent. Complete Auto, 488 U.S. at 261.

To be internally consistent the tax must be structured such that if every state imposed an identical statute, no multiple taxation would occur. Id. The statute involved in this case imposes a tax on the gross receipts of each sale of transportation for hire to persons by common carrier, but does not identify a point of sale with respect to transportation.⁴ The result is a tax that could encompass transportation sold in

⁴ The Appellant does identify a point of sale definition in its tax code, however it does not appear to apply to Okla. Stat. tit. 68, § 1354(1)(C)(1981 and Supp. 1990).

Oklahoma, but that may not occur in Oklahoma or that may tax transportation sold in other states but that does occur in Oklahoma. In other words, due to the language of the statute, it may allow a tax on the transaction if the receipt of either the ticket or the transportation occurs in Oklahoma.

The activity here, transportation provided by Greyhound on all routes except those wholly within the state of Oklahoma, occurs at least partially in another state. If those states in which the transportation occurred had an identical statute to the one in this case, they would be able to tax the transportation which occurred within their boundaries, thereby causing multiple taxation. For example, assume that one of the tickets sold in Oklahoma was for transportation between Austin and Dallas, and Texas had a statute identical to Oklahoma, one that could conceivably tax both the ticket or the transportation. In that scenario both Texas and Oklahoma could tax the single transaction thereby preventing the tax from being internally consistent. The Supreme Court has noted that only a tax which allows credits for taxes collected by other states on the same transaction can survive this test for constitutionality. Goldberg, 488 U.S. 265.

To be externally consistent, the tax must apply only to that portion of the revenue from interstate activity which reasonably reflects the in-state component of that activity. Id. The Claim in this case was for taxes that reflected out of state activities, and therefore the tax is not externally consistent. The Court does not agree with the Appellant that the taxes in this case are self apportioning because the state does not collect taxes on transportation that occurs in Oklahoma, but is ticketed elsewhere. The Statute therefore clearly fails the second prong of the Complete Auto test.

Discrimination Against Interstate Commerce

The third prong of the test requires the taxing authority to show that the tax does not discriminate against interstate commerce. If the discrimination is reflected on the face of the statute, the intent of the statute, or the practical effect of the statute, then the tax discriminates against interstate commerce and is violative of the Commerce Clause. Amerada Hess Corp. v. Director Div. of Taxation, N.J. Department of the Treasury, 490 U.S. 66, 75-79 (1989). The tax in this case is discriminatory in its practical effect in that it could result in multiple taxation on interstate travelers, while intrastate travelers would not subject to the same burdens. This result is demonstrated infra in this Court's discussion of apportionment.

Relation to State Services

The last prong of the Complete Auto test inquires as to whether or not the tax imposed is related to the presence and activities of the tax payer within the state. The purpose of such an inquiry is to prevent the state's tax burden from hindering those who do not benefit from the services provided by the state. See Commonwealth Edison v. Montana, 453 U.S. 609 (1981).

There is no dispute that the bus passengers/tax payers in this case that travel on intrastate routes in Oklahoma benefit from the services provided by Oklahoma. However, the activities in this case concern actions that occur, at least in part, out of the confines of Oklahoma. The passengers who travel out of the state of Oklahoma, but purchased their tickets in Oklahoma, pay taxes on this transportation, yet for the period that they are not in Oklahoma they do not receive the benefit of Oklahoma's services. Therefore there is no relation

between some the activities attempted to be taxed in this case and the services provided by the State and as a result the tax fails the last prong of Complete Auto.

After a De Novo review of the Bankruptcy Judge's denial of the Appellant's Claim in Bankruptcy No. 90-00985-B-11, it is the Opinion of the Court that because the tax as applied in this case does not satisfy the Supreme Court's test in Complete Auto it was properly denied. The Bankruptcy Court's Order is AFFIRMED.

DONE at Brownsville, Texas this 4th day of October, 1993.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge